

DURIE TANGRI LLP
MARK A. LEMLEY (SBN 155830)
mlemley@durietangri.com
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendant
Audience Entertainment LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TIMEPLAY, INC., a Canadian
corporation,

Plaintiff,

v.

AUDIENCE ENTERTAINMENT
LLC, a Delaware Limited Liability
Company,

Defendant.

Case No. 2:15-cv-05202-SJO-JC

**DEFENDANT'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION TO
DISMISS FOR LACK OF
PATENTABLE SUBJECT MATTER**

Date: October 19, 2015

Time: 10:00 am

Ctrm: 1

Judge: Judge S. James Otero

TABLE OF CONTENTS

		Page
1		
2		
3	I. INTRODUCTION	1
4	II. LEGAL STANDARDS	2
5	A. The Court Can And Should Undertake The Section 101 Inquiry At The	
6	Pleadings Stage.....	2
7	B. THE SUPREME COURT’S SECTION 101 FRAMEWORK	3
8	III. THE PATENT-IN-SUIT IS DIRECTED TO UNPATENTABLE SUBJECT	
9	MATTER	4
10	A. Claim 1 Is Directed to Basic Concepts of Multi-Player Gaming.....	5
11	B. <i>Alice</i> Step One: The Patent Is Directed to an Abstract Idea	6
12	C. <i>Alice</i> Step Two: The Patent Does Not Claim An “Inventive Concept”	10
13	1. The Only Hardware Described Is In Purely Functional And	
14	Generic Terms.....	11
15	2. The Claims Do Not Improve The Functionality Of The System’s	
16	Components	12
17	3. The Claims Risk Unduly Preempting Multi-Player Gaming With	
18	A Shared Display	13
19	D. The Remaining Claims Are Also Unpatentable.....	15
20	IV. CONCLUSION.....	16
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Accenture Global Servs., GmbH v. Guidewire Software, Inc.</i> , 728 F.3d 1336 (Fed. Cir. 2013)	12
<i>Alice Corp. Pty. Ltd. v. CLS Bank Int'l</i> , 134 S. Ct. 2347 (2014).....	passim
<i>Ariosa Diagnostics, Inc. v. Sequenom, Inc.</i> , 788 F.3d 1371 (Fed. Cir. 2015)	14
<i>Bilski v. Kappos</i> , 561 U.S. 593 (2010).....	1, 2, 4, 13
<i>buySAFE, Inc. v. Google, Inc.</i> , 765 F.3d 1350 (Fed. Cir. 2014)	7, 12
<i>CLS Bank Int'l v. Alice Corp. Pty. Ltd.</i> , 717 F.3d 1269 (Fed. Cir. 2013)	4
<i>Compression Tech. Solutions, LLC v. EMC Corp.</i> , 557 Fed. App'x 2002 (Fed. Cir. 2014)	3
<i>Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.</i> , 776 F. 3d 1343 (Fed. Cir. 2014)	3, 4, 16
<i>Cyberfone Sys., LLC v. Cellco P'ships</i> , 885 F. Supp. 2d 710 (D. Del. 2012).....	2
<i>Cybersource Corp. v. Retail Decisions, Inc.</i> , 654 F.3d 1366 (Fed. Cir. 2011)	7
<i>Dealertrack, Inc. v. Huber</i> , 674 F.3d 1315 (Fed. Cir. 2012)	2
<i>Funk Bros. Seed Co. v. Kalo Inoculant Co.</i> , 333 U.S. 127 (1948).....	1
<i>In re TLI Comm'n's Patent Litig.</i> , MDL No. 1:14md2534, 2015 WL 627858 (E.D. Va. Feb. 6, 2015)	9, 12
<i>Intellectual Ventures I, LLC v. Motorola Mobility LLC</i> , No. 11-908-SLR, 2015 WL 846532 (D. Del. Feb. 24, 2015).....	12
<i>Internet Patents Corp. v. Active Network, Inc.</i> , 790 F.3d 1343 (Fed. Cir. 2015)	2
<i>IPLearn, LLC v. K12 Inc.</i> , No. CV 11-1026-RGA, 2014 WL 7206380 (D. Del. Dec. 17, 2014)	9

1	<i>IPLearn-Focus, LLC, v. Microsoft Corp.</i> ,	
2	No. 14-cv-00151-JD, 2015 WL 4192092 (N.D. Cal. July 10, 2015)	7, 8, 14
3	<i>Loyalty Conversion Sys. Corp. v. Am. Airlines, Inc.</i> ,	
4	66 F. Supp. 3d 829 (E.D. Tex. 2014).....	12
5	<i>Mayo Collaborative Servs. v. Prometheus Labs., Inc.</i> ,	
6	132 S. Ct. 1289 (2012).....	passim
7	<i>OIP Techs., Inc. v. Amazon.com, Inc.</i> ,	
8	788 F.3d 1359 (Fed. Cir. 2015)	2
9	<i>Open Text S.A. v. Box, Inc.</i> , No.	
10	13-cv-04910, slip op. (N.D. Cal. Jan. 20, 2015).....	12
11	<i>Open Text S.A., v. Alfresco Software Ltd.</i> ,	
12	No. 13-cv-04843-JD, 2014 WL 4684429 (N.D. Cal. 2015).....	11
13	<i>Planet Bingo, LLC v. VKGS LLC</i> ,	
14	576 Fed. App'x 1005 (Fed. Cir. 2014)	6
15	<i>SiRF Tech., Inc. v. Int'l Trade Comm'n</i> ,	
16	601 F.3d 1319 (Fed. Cir. 2010)	2
17	<i>Ultramercial, Inc. v. Hulu, LLC</i> ,	
18	772 F.3d 709 (Fed. Cir. 2014)	2
19	<u>Statutes</u>	
20	35 U.S.C. § 101	passim
21	<u>Rules</u>	
22	Fed. R. Civ. P. 12(b)(6).....	2

1 I. INTRODUCTION

2 The Supreme Court has made clear time and again that “abstract ideas” may not be
 3 removed from the public domain and subjected to the monopoly granted by our patent
 4 laws. *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2355, (2014); *Mayo*
 5 *Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1293 (2012); *Bilski v.*
 6 *Kappos*, 561 U.S. 593, 611 (2010). These fundamental concepts are “part of the
 7 storehouse of knowledge of all men . . . free to all men and reserved exclusively to none.”
 8 *Bilski*, 561 U.S. 602 (quoting *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127,
 9 130 (1948)). Instead, patent law protects only concrete and tangible inventions. It does
 10 not protect abstract ideas or concepts, even when those concepts are implemented using
 11 conventional computer hardware. *Alice*, 134 S.Ct. at 2358 (“[T]he mere recitation of a
 12 generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible
 13 invention.”); *id.* at 2359 (requiring the performance of “computer functions [that] are
 14 ‘well-understood, routine, conventional active[ties]’ previously known to the industry” is
 15 nothing more than “simply instruct[ing] the practitioner to implement the abstract idea . . .
 16 on a generic computer” (citing *Mayo*, 132. S. Ct. at 1294)).

17 U.S. Patent No. 8,951,124 (“the ’124 Patent”) claims nothing more than the abstract
 18 idea of allowing multiple people to play a game together on a shared display using generic
 19 computer and communications hardware. Although the patent claims are laden with
 20 technical jargon and the sort of turgid language that has become a hallmark of patent
 21 drafting, at bottom, they recite nothing more than the concept of multi-player gaming on a
 22 shared screen implemented with conventional computer and communications equipment
 23 specified at a high level of generality and performing conventional functions. That is
 24 simply not enough to make them patentable.

25 Audience Entertainment respectfully requests that this Court find that all claims of
 26 the patent-in-suit are invalid, and dismiss TimePlay’s Complaint accordingly.

II. LEGAL STANDARDS

A. The Court Can And Should Undertake The Section 101 Inquiry At The Pleadings Stage

Whether a patent claim is drawn to patent-eligible subject matter under § 101 is a threshold inquiry and an issue of law. *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012); *see also Bilski*, 561 U.S. at 602 (describing Section 101 as “a threshold test.”); *SiRF Tech., Inc. v. Int’l Trade Comm’n*, 601 F.3d 1319, 1331 (Fed. Cir. 2010) (noting that “whether a claim is drawn to patent-eligible subject matter is an issue of law”).

For this reason, a district court has broad discretion as to the appropriate time to decide whether a claim satisfies the requirements of Section 101. In line with this discretion, many federal district courts have resolved disputes over patentable subject matter on motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). The Federal Circuit has regularly affirmed Rule 12 dismissals on the basis of patentable subject matter. *See, e.g., Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1349 (Fed. Cir. 2015) (affirming Rule 12(b)(6) determination of ineligibility); *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362 (Fed. Cir. 2015) (same); *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 712 (Fed. Cir. 2014) (same).

In the present case, the Section 101 issue is ripe for decision because the validity of the asserted claims does not turn on claim construction. To the extent TimePlay thinks that its preferred construction of a particular term would make a difference to the eligibility analysis, it should come forward with that construction, provide the supporting intrinsic evidence, and explain how its construction would change the result. *Cyberfone Sys., LLC v. Cellco P’ships*, 885 F. Supp. 2d 710, 715 (D. Del. 2012) (because “plaintiff did not explain how claim construction might alter [the court’s Section 101] analysis . . . the court concludes that it may proceed without the benefit of claim construction”). Absent such a showing, however, the Section 101 issue may properly be decided without claim construction. *See Compression Tech. Solutions, LLC v. EMC Corp.*, 557 Fed. App’x 2002

(Fed. Cir. 2014) (summary affirmance of district court’s decision to invalidate claims under Section 101 prior to claim construction after concluding that accepting plaintiff’s proffered construction made no difference in the result).

B. THE SUPREME COURT’S SECTION 101 FRAMEWORK

The Supreme Court has prescribed a two-step approach for resolving the question of whether a claim is drawn to subject matter that falls outside the scope of Section 101. *Alice*, 134 S. Ct. at 2355; *Mayo*, 132 S. Ct. at 1294–98. The first step is to determine whether the claim at issue is directed to a “patent-ineligible concept” such as an abstract idea. *Alice*, 134 S. Ct. at 2355. If it is, the second step is to identify “what else” is claimed in order to determine whether the claim describes an “inventive concept” that is “significantly more” than the abstract idea and sufficient to “transform” the nature of the claim. *Id.* If it does not, the claim is ineligible under Section 101 and therefore invalid.

If a patent claim includes an abstract idea, the necessary inventive concept cannot simply be the implementation of the idea using standard, off-the-shelf computer technology. *Id.* at 2352 (“[M]erely requiring generic computer implementation fails to transform that abstract idea into a patent-eligible invention.”); *id.* at 2358–59 (“Given the ubiquity of computers, wholly generic computer implementation is not generally the sort of ‘additional featur[e]’ that provides any ‘practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.’ (quoting *Mayo*, 132 S. Ct. at 1297)).¹ Indeed, the Federal Circuit has made clear that even combining two or more different pieces of standard computer technology is not sufficient to render a claim patentable. *See, e.g., Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F. 3d 1343, 1347–48 (Fed. Cir. 2014).

Notably, method, system, and device claims are all analyzed identically under Section 101. The only inquiry for whether method, system, and device claims directed at

¹ Emphasis added and internal citations omitted throughout, unless otherwise noted.

1 abstract ideas are invalid is whether the claims “add nothing of substance to the underlying
 2 abstract idea.” *Alice*, 134 S. Ct. at 2360. The Supreme Court has made clear that
 3 analyzing method, system and device claims differently under Section 101 would
 4 improperly “make patent eligibility ‘depend simply on the draftsman’s art.’” *Id.* (quoting
 5 *Mayo*, 132 S. Ct. at 1294). Accordingly, the mere fact that a system or device claim may
 6 include some hardware limitation not present in the method claims makes no difference for
 7 the Section 101 inquiry. If “none of the hardware recited by the system claims ‘offers a
 8 meaningful limitation beyond generally linking “the use of the [method] to a particular
 9 technological environment,’” then the system claims must fail along with the method
 10 claims. *Id.* (quoting *CLS Bank Int’l v. Alice Corp. Pty. Ltd.*, 717 F.3d 1269, 1290 (Fed. Cir.
 11 2013) (quoting *Bilski*, 561 U.S. at 610)).

12 Finally, while individual patent claims are independent legal rights, courts are free to
 13 treat claims together for purposes of resolving patentable subject matter where those claims
 14 contain the same basic elements. This also flows from the basic principle that Section 101
 15 turns on the subject matter of the claims, not on claim drafting. *See Alice*, 134 S. Ct. at
 16 2360. For this reason, a movant may challenge eligibility through representative claims
 17 and without engaging in a repetitive attack on each claim individually. *See Content*
 18 *Extraction*, 776 F. 3d at 1348 (finding that the district court “correctly determined that
 19 addressing each claim of the asserted patents was unnecessary” because “all the claims are
 20 ‘substantially similar and linked to the same abstract idea’”).

21 **III. THE PATENT-IN-SUIT IS DIRECTED TO UNPATENTABLE SUBJECT** 22 **MATTER**

23 TimePlay’s Complaint alleges that Audience Entertainment infringes “one or more”
 24 claims of the ’124 Patent. During the parties’ meet and confer, Audience Entertainment
 25 requested that TimePlay identify which claims would be asserted or at least which claims
 26 would not be asserted in this case so that Audience Entertainment could focus this motion
 27 accordingly. TimePlay declined to do so. Accordingly, Audience Entertainment addresses
 28

1 all claims in the patent, which should rise and fall together as explained below.

2 **A. Claim 1 Is Directed to Basic Concepts of Multi-Player Gaming**

3 According to the '124 Patent, the claimed invention relates to “systems and methods
4 for multi-player gaming.” D.I. 1-1 at Abstract. Its stated goal is to address and ameliorate
5 what it considers to be problems with multi-player gaming where a large number of people
6 can play a game on a single large display screen like a movie screen. *See id.* at 1:25-47.
7 While the patent *specification* describes a variety of embodiments of systems that allow
8 multi-player gaming with a shared display, and even provides some specifics as to how it
9 contemplates those systems would be designed, the patent *claims* are abstract. To wit, the
10 patent purports to claim the idea of allowing multiple people to play a game together using
11 generic computer and communications hardware.

12 Claim 1 is exemplary and provides as follows:

13 1. A multi-player game system comprising:

14 [1] a game server configured to run a game software to facilitate a multi-
15 player game, the game server further configured to provide display signals
16 for displaying the multi-player game;

17 [2] a display system having primary display means, the display system being
18 configured to provide a primary game display of the multi-player game on
the primary display means in response to the display signals;

19 [3] a plurality of handheld game controllers, each handheld game controller
20 having secondary display means and input means; and

21 [4] communication controller for enabling communication between the game
22 server and each handheld game controller;

23 [5] wherein the plurality of handheld game controllers are located in
24 proximity to the primary display means such that the primary display means
25 is visible to game players manipulating respective handheld game
controllers; and

26 [6] wherein the game server is configured to download a game software
27 module to each handheld game controller using the communication
28 controller prior to initiation of the multi-player game, each game software

1 module executable by the corresponding handheld game controller to enable
 2 the corresponding handheld game controller to provide a secondary game
 3 display on the secondary display means in response to player input received
 4 at the input means, wherein the secondary game display is complementary to
 5 the primary game display, and to enable participation in the multi-player
 6 game by the corresponding game player.

7 D.I. 1-1 at Claim 1.

8 In substance, the patent claims [1] a generic server running generic game software
 9 and sending generic display signals to a [2] generic display that shows the game to multiple
 10 people each with their own [3] generic game controller (with a display and interface for
 11 user input) that talks to the generic server via a [4] generic communications controller to
 12 [6] receive a download of a generic software module that allows the display on the generic
 13 game controller to be coordinated with that on the shared generic display. Because the two
 14 displays are coordinated, the patent specifies that the generic game controllers should be
 15 [5] close enough to the shared generic display that the players can see the shared generic
 16 display while they are playing.

17 Critically, when all of the claim's generic computer and communications
 18 components (server, game controller, communications controller, display, etc.) are stripped
 19 away, all that remains is the underlying concept of multi-player gaming using a hand-held
 20 controller that has a display screen where the players are also in front of a shared display.

21 **B. Alice Step One: The Patent Is Directed to an Abstract Idea**

22 The Supreme Court and the Federal Circuit have repeatedly found that methods of
 23 organizing "human activity" constitute abstract ideas. *E.g.*, *Alice*, 134 S. Ct. at 2356;
 24 *Planet Bingo, LLC v. VKGS LLC*, 576 Fed. App'x 1005, 1008 (Fed. Cir. 2014). The
 25 claims of the '124 Patent are directed to just that: a system that enables a basic method of
 26 organization of human activity—interactive game-playing with multiple people—on
 27 generic hardware. Game-playing with groups of people is an age-old concept for
 28 organizing (or in the case of young children, *attempting* to organize) human activity.

1 Indeed, it is hard to think of a way to organize human activity that is more fundamental to
2 the human existence or more ubiquitous than interactive game play with multiple people.
3 And whether it be children playing in a classroom with a blackboard or families playing
4 Pictionary at “game night,” the concept of using a shared display to allow individuals to
5 play the game together is just as basic.

6 Second, and closely related, if the claims can be performed by human beings in a
7 non-computerized context, minus the limitations that require generic computer
8 implementation, they are abstract. *See, e.g., buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350,
9 1353 (Fed. Cir. 2014); *Cybersource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1371–
10 73 (Fed. Cir. 2011). Here, aside from the limitations that include or require a generic
11 computer or communications system implementation, the asserted claims amount to little
12 more than the human executable (and ubiquitous) act of multiple people playing a game
13 together in front of a shared display such as that blackboard or Pictionary easel.

14 It is true that the invention here uses computer technology. But that does not prevent
15 it from including an abstract idea. To the contrary, virtually every Federal Circuit decision
16 invalidating a claim under the *Alice* framework has involved an idea implemented in
17 computer technology. The question in step one of the *Alice* analysis is whether the claims
18 include an abstract idea, even if that idea operates in the sphere of computer technology or
19 is implemented using computer devices. That is true here. Not only have people been
20 playing games together for ages, but people have been playing video games against each
21 other in front of a television screen since well before the date of this patent.

22 For all of these same reasons, district courts reviewing claims conceptually similar
23 to those at issue here have found those claims to be directed to abstract ideas. For
24 example, in *IPLearn-Focus, LLC, v. Microsoft Corp.*, No. 14–cv–00151–JD, 2015 WL
25 4192092 (N.D. Cal. July 10, 2015), the district court addressed the subject matter
26 eligibility of a claim directed to “a computer-implemented system helping a user learn
27 using a detached imaging sensor. . . .” *Id.* at *2. “Through monitoring the user’s volitional
28

1 or involuntary behavior, the system determines whether to change what is to be presented
 2 by the display[.]” and the “change could include providing rewards, punishments, and
 3 stimulation; or changing the materials.” *Id.* Notably, the representative claim in that case
 4 was similar to the claims of the ’124 Patent in that they both relate a system combining
 5 various computer-implemented hardware elements such as a display and processor:

6 1. A computing system comprising:

7 a display;

8 an imaging sensor to sense a first feature of a user regarding a first volitional
 9 behavior of the user to produce a first set of measurements, the imaging
 10 sensor being detached from the first feature to sense the first feature, the first
 11 feature relating to the head of the user, and the first set of measurements
 12 including an image of the first feature, wherein the system further to sense a
 13 second feature of the user regarding a second volitional behavior of the user
 to produce a second set of measurements, the second feature not relating to
 the head of the user; and

14 a processor coupled to the imaging sensor and the display, the processor to:

15 analyze at least the first set and the second set of measurements; and

16 determine whether to change what is to be presented by the display in view
 17 of the analysis.

18 *Id.*

19 In analyzing this claim, the court in *IPLearn-Focus* determined that “[a] plain
 20 reading of the patents as a whole establishes beyond any reasonable dispute that they seek
 21 to implement on a computer the watchful eye of a good teacher, ‘who constantly observes[]
 22 concentration-sensitive behavior, and dynamically adjusts her teaching materials and style
 23 accordingly.’” *Id.* at *4. The court determined that the “concept of a monitored response to
 24 presentations is an abstract idea, pure and simple.” *Id.*

25 Critically, the court rejected an argument by the patent-holder that it should “focus
 26 on the minutiae of the physical components, like displays, processors, and sensors, recited
 27 by the claims” to find that the claims were not directed to something more than the abstract
 28

1 idea. *Id.* Instead, the court followed the guidance of *Alice* and its progeny to strip away
2 the conventional technology and instead evaluate the underlying concept of claims:

3 ***Put aside the parts reciting standard technology*** (“display,” “imaging
4 sensor,” “processor,” etc.), and what is left is “sens[ing]” two features of the
5 user to generate measurements, “analyz[ing]” the measurements, and
6 “determin[ing] whether to change what is to be presented by the display in
7 view of the analysis.” ’320 patent, claim 1. In essence, the claim follows
8 several steps involved in the abstract idea of teaching, though without
9 actually mentioning that specific application: the sensor observes students
10 and the processor analyzes their behavior and reacts accordingly. The steps
are an abstraction, “addressed to fundamental human behavior related to
instruction, which is apparent when the steps are summarized without their
generic references to [hardware].”

11 *Id.* (quoting *IPLearn, LLC v. K12 Inc.*, No. CV 11–1026–RGA, 2014 WL 7206380, at *6
12 (D. Del. Dec. 17, 2014) (holding that a patent directed at the abstract idea of “instruction,
13 evaluation, and review,” purports to cover learning methods that “seem[] precisely the
14 building blocks of ingenuity the Supreme Court in *Alice Corp.* was so concerned about
15 inhibiting.”)).

16 The claims of the ’124 Patent are no different from those at issue in *IPLearn-Focus*.
17 Just as in *IPLearn-Focus*, the court should not “focus on the minutiae of the physical
18 components, like displays, processors, and sensors, recited by the claims” but instead look
19 at the underlying concept that is being claimed. Here, as there, “put aside the parts reciting
20 standard technology (‘display,’ ‘[communications controller],’ ‘[game server],’ etc.),” and
21 what is left in the claims is the concept of “facilitat[ing] a multi-player game” where the
22 game players have a personal display on their controller and are playing on a shared
23 display. In other words, an abstract idea that is claimed as a system of various generic
24 computer and communications components is still an abstract idea.²

25
26 ² Other cases reject similar claims. In *In re TLI Comm’n’s Patent Litig.*, MDL No.
27 1:14md2534, 2015 WL 627858 (E.D. Va. Feb. 6, 2015), the court granted a motion to
28 dismiss a claim that, like the ones here, involved communication of digital images between

C. *Alice* Step Two: The Patent Does Not Claim An “Inventive Concept”

The second step of the *Alice* inquiry requires the Court to search for an inventive concept that is “sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.” *Alice*, 134 S. Ct. at 2355. Here, there can be no genuine dispute that the asserted claims are lacking any inventive concept.

a handheld device and a central computer. That claim read:

A communications system for recording and administering digital images, comprising:

at least one telephone unit including:

a telephone portion for making a telephone call,

a digital pick up unit for recording images,

a memory for storing images recorded by the digital pick up unit,

means for allocating classification prescribed by a user of said at least one telephone unit to characterize digital images obtained by said digital pick up unit, a processor for processing the digital images recorded by the digital image pick up unit;

a server including the following components:

a receiving unit for receiving data sent from said at least one telephone unit,

an analysis unit for analyzing the data received by the receiving unit from the telephone unit,

the data including classification information to characterize the digital images,

a memory in which at least the digital images are archived,

the archiving taken [sic] into consideration the classifying information; and

a transmission system coupled to said at least one telephone unit and to the said server to provide for transmission of data from said at least one telephone unit and to the said server, the data including at least the digital images recorded by the digital image pick up unit and classification information.

Id. at *1–*2.

1 1. **The Only Hardware Described Is In Purely Functional And** 2 **Generic Terms**

3 The Supreme Court has explained that “if a patent’s recitation of a computer
4 amounts to a mere instruction to ‘implemen[t]’ an abstract idea ‘on . . . a computer,’ . . . that
5 addition cannot impart patent eligibility.” *Alice*, 134 S. Ct. at 2358 (quoting *Mayo*, 132 S.
6 Ct. at 1301). In *Alice*, the Court invalidated the claims because the hardware invoked was
7 “purely functional and generic.” *Id.* at 2360.

8 Applying that standard, the ’124 Patent claims rely on a generically-specified
9 computer and communications devices, and thus ultimately amount to nothing more than
10 claims to implement the abstract idea with generic computers and communications
11 components. Indeed, the components in the asserted claims are described in generic and
12 functional ways. For example, in representative claim 1, the “display” claimed as
13 “display” having a primary “display means” and being configured to provide a display of
14 the game in response to display signals. D.I. 1-1 at Claim 1. The “game server” is claimed
15 as configured to run and download software and provide display signals. *Id.* The
16 “communication controller” is “for enabling communication between the game server and
17 each handheld controller.” *Id.* Likewise, even the dependent claims that have additional
18 limitations on the hardware, describe generic components like a “large screen display”
19 (D.I. 1-1 at Claim 2) or “wireless communications means” such as “wireless receivers,”
20 “wireless transmitters” and “wireless transceivers” (D.I 1-1 at Claims 17-21).³

21 Ultimately, none of these articulations of the system components are sufficient to
22

23 ³ In any event, the addition of further components in the dependent claims does not
24 render them patentable. *See Open Text S.A., v. Alfresco Software Ltd.*, No. 13-cv-04843-
25 JD, 2014 WL 4684429, at *5 (N.D. Cal. Sept. 19, 2014) (rejecting dependent claims with
26 the additional limitation of an e-mail server because such a claim “merely builds on the
27 same basic concept . . . by using . . . a decades-old technology that is certainly not
28 inventive – to accomplish the abstract . . . scheme” and determining that “[i]n no way does
that sufficiently limit the nature of the abstract idea”).

1 save the claims because none of the claims require any hardware or software beyond
 2 commonly available components. Indeed, numerous courts (including the Supreme Court)
 3 have found that recitation of hardware of precisely this sort of is just not enough. *E.g.*,
 4 *Alice*, 134 S. Ct. at 2360 (explaining that “what petitioner characterizes as specific
 5 hardware—a ‘data processing system’ with a ‘**communications controller**’ and ‘data
 6 storage unit,’ ... is purely functional and generic”); *In re TLI*, 2015 WL 627858, *1–*2,
 7 *26 (invalidating claim covering a system comprising a “telephone unit,” “processor,”
 8 “memory,” and “server”), *Accenture Global Servs., GmbH v. Guidewire Software, Inc.*,
 9 728 F.3d 1336, 1344 (Fed. Cir. 2013) (finding claims reciting a client and **server** invalid);
 10 *Open Text S.A. v. Box, Inc.*, No. 13-cv-04910, slip op. at 8 (N.D. Cal. Jan. 20, 2015)
 11 (rejecting Open Text’s assertion that the use of a “**server**” renders a claim patent eligible);
 12 *Intellectual Ventures I, LLC v. Motorola Mobility LLC*, No. 11-908-SLR, 2015 WL
 13 846532, at *8 (D. Del. Feb. 24, 2015) (holding that recitation of hardware elements such as
 14 a “remote computer system,” a “user station,” and a “communications network” are
 15 “insufficient” to render claimed subject matter patent eligible); *Loyalty Conversion Sys.*
 16 *Corp. v. Am. Airlines, Inc.*, 66 F. Supp. 3d 829, 833 (E.D. Tex. 2014) (Bryson, J., sitting by
 17 designation) (finding claims directed to “a computer serving a set of one or more Web
 18 pages . . . to one or more remotely located client machines” invalid under Section 101).
 19 Because all of the hardware recited by the claims of the ’124 Patent is described by generic
 20 and functional language, it provides no inventive concept to limit the extent to which the
 21 asserted claims attempt to monopolize the abstract idea.

22 **2. The Claims Do Not Improve The Functionality Of The System’s** 23 **Components**

24 Another factor courts can look to for an inventive concept is whether the claims
 25 “purport to improve the functioning of the computer itself” or “effect an improvement in
 26 any other technology or technical field.” *buySAFE, Inc. v. Google, Inc.*, 765 F.3d at 1354;
 27 *Alice*, 134 S. Ct. at 2351.

1 The '124 Patent does not purport to make any improvement to the generic hardware
 2 on which the claims run. For example, the patent does not purport to invent any new or
 3 novel display, instead describing the primary (shared) display as “preferably a large display
 4 screen, for example of a size which is used in a cinema,” and contemplating that that
 5 screen be a “projection screen” using “normally used for projecting films if that equipment
 6 is configured for projecting digital images.” D.I. 1-1 at 2:20-27 (Summary of the
 7 Invention). As another example, the patents do not purport to invent new or novel game
 8 controller. *Id.* at 2:28-32 (“The game controllers are preferably small handheld computing
 9 devices with wireless transmitter means for communicating with the game server.”
 10 (Summary of the Invention)).

11 And importantly, the claims will not make any of their computer or communications
 12 components run faster or more efficiently. Instead, the claims are only directed at
 13 combining those preexisting components (each used for its previously intended purposes)
 14 to achieve the overall purpose of the claim—its underlying abstract idea.

15 **3. The Claims Risk Unduly Preempting Multi-Player Gaming With A** 16 **Shared Display**

17 A patent on an abstract idea effectively preempts the idea itself, and attempts to
 18 claim ownership of inventions that a patentee never conceived of, and did not contribute to
 19 the state of the art by way of his patent application. *See Bilski*, 561 U.S. at 611–12; *Mayo*,
 20 132 S. Ct. at 1294 (finding that, by covering a broad range of potential known and
 21 unknown uses of an abstract idea, a patent would preempt an entire field and “risk
 22 disproportionately tying up” the use of the abstract idea). For that reason, *Alice* cautioned
 23 courts to “distinguish between patents that claim the building blocks of human ingenuity
 24 and those that integrate the building blocks into something more.” *Alice*, 134 S. Ct. at
 25 2354. “The former ‘would risk disproportionately tying up the use of the underlying’
 26 ideas, and are therefore ineligible for patent protection. The latter pose no comparable risk
 27 of pre-emption, and therefore remain eligible for the monopoly granted under our patent
 28

1 laws.” *Id.* To be clear, preemption is not the test for patentability. A claim that fails the
 2 two-step *Alice* framework is unpatentable whether or not it preempts broadly. *Mayo*, 132
 3 S. Ct. at 1302 (“The laws of nature at issue here are narrow laws that may have limited
 4 applications, but the patent claims that embody them nonetheless implicate this concern.”);
 5 *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (“While
 6 preemption may signal patent ineligible subject matter, the absence of complete
 7 preemption does not demonstrate patent eligibility.... Where a patent’s claims are deemed
 8 only to disclose patent ineligible subject matter under the *Mayo* framework, as they are in
 9 this case, preemption concerns are fully addressed and made moot.”). But preemption is
 10 one of the concerns that motivates the patentable subject matter analysis.

11 Here, the claims risk potentially preempting the concept of multi-player gaming with
 12 a shared display broadly—for entertainment, for educational purposes, in the sports
 13 context, just to name a few. Indeed, taken on their face and as TimePlay’s Complaint
 14 alleges it is applying them, the claims of the ’124 Patent could be read to cover multi-
 15 player gaming with a shared display in virtually any context or configuration so long as
 16 generic, functional components of a display (such as a smartphone), server, controller, etc.
 17 are employed. Such broad claims jeopardize future innovation disproportionately “relative
 18 to the contribution of the inventor.” *Mayo*, 132 S. Ct. at 1303. And indeed, “[t]he fact that
 19 the patents describe a wide variety of alternative configurations of generic hardware only
 20 underscores their potential to preempt virtually all practical implementations of the
 21 concept.” *IPLearn-Focus*, 2015 WL 4192092, at *6.

22 To be sure, TimePlay may have invented something new and described that
 23 invention in the ’124 Patent. The specification includes discussion of a number of specific
 24 technologies, and it may be that one or more of those specific technologies is novel. But
 25 TimePlay made the strategic decision during the eleven years its application was pending
 26 in the Patent Office to pursue patent claims that were not limited to any of those
 27 technologies. Rather, TimePlay has sought to write its claims in such a broad, abstract
 28

1 manner that they cover virtually any system of multi-player gaming that combines basic
2 off-the-shelf components, including devices like modern smartphones that TimePlay
3 cannot even purport to have invented. It is just that effort to write broad, abstract,
4 functional claims rather than claims to specific implementing technology that *Alice* forbids.

5 **D. The Remaining Claims Are Also Unpatentable**

6 Claim 1 is representative of the remaining asserted claims for purposes for the
7 Section 101 patentability analysis. Claim 1 is substantively the same as the other
8 independent claims—claims 37 and 38—with only minor differences: (a) claim 37
9 contemplates “local” generic game controllers with a user input interface (but without their
10 own display) and adds the requirement of at least one generic game controller that is
11 “remote” from the shared display that has its own display; and (b) claim 38 is identical to
12 claim 1 except that it adds the clause that the generic software module downloaded to the
13 controllers is to “facilitate game activities corresponding to the multi-player game.” These
14 differences do not go to the subject matter of the claim or its patentability.

15 The dependent claims (claim 2-36) also relate to the same subject matter, claiming
16 generally the same system but with various additional limitations directed to: (a) specifying
17 the display is a large screen display (claim 2); (b) locating the system in a “game arena”
18 (claims 3-4); (c) connecting the controllers to a fixed structure or tethering the controllers
19 (claims 5-10); (d) the relationship between what is displayed on the shared displays and
20 individual displays (claims 11-13); (e) specifying the game controller display relates to a
21 single player’s activity and its type (claims 14-16); (f) claiming the generic
22 communications controller is coupled to a generic “wireless communications means” and
23 how (claims 17-21); (g) providing that each individual player can be represented as an
24 avatar on the shared display and receives some feedback (e.g., visual, vibratory, or
25 auditory) (claims 21-24); (h) conventional input means such as a joystick or touchscreen
26 (claims 25-28); (i) separate conventional power sources for the generic game controllers
27 (claims 29-30); (j) processor for processing commands and communications between the
28

game controller and game server (claims 31-33, 36); and (k) messaging between users (claims 34-35). Because these differences again are directed to, at best, further abstractions of the multi-player gaming concept or further recitation of generic computer and communications hardware, the additional requirements of the various dependent claims do not go to the ultimate subject matter of the claims or there patentability.⁴

IV. CONCLUSION

For the foregoing reasons, Audience Entertainment respectfully requests that the Court grant its Motion To Dismiss For Lack Of Patentable Subject Matter.

Dated: September 3, 2015

DURIE TANGRI LLP

By: /s/ Sonal N. Mehta
SONAL N. MEHTA

Attorneys for Defendant
Audience Entertainment LLC

⁴ To the extent that TimePlay contends that any of the dependent claims includes differences that are material to the patentability analysis, it is incumbent on TimePlay to confirm that it is in fact asserting that claim in the litigation and explain why it believes it should be considered separately so that Audience Entertainment and the Court can address it. *Content Extraction*, 776 F. 3d at 1348 (“Moreover, CET never asserted in its opposition to PNC’s motion that the district court should have differentiated any claim from those identified as representative by PNC. Nor did CET identify any other claims as purportedly containing an inventive concept. If CET disagreed with PNC’s or the district court’s assessment, CET could have identified claims in its opposition brief that it believed would not be fairly represented by claims 1 of the ’855 and ’416 patents for purposes of PNC’s § 101 challenge.”).

CERTIFICATE OF SERVICE

I, hereby certify that on September 3, 2015 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Sonal N. Mehta
SONAL N. MEHTA